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89850—37——1

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 504

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PACIFIC GREYHOUND LINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (R. 268–272) is reported in 91 F. (2d) 458. The findings of fact and the order of the National Labor Relations Board (R. 36–61) are reported in 2 N. L. R. B. 431.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 28, 1937 (R. 273–275). The peti-

tion for a writ of certiorari was filed on October 14, 1937, and was granted on November 22, 1937. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether—upon a finding that respondent instituted, formed and sponsored a labor organization of its employees, dominated and interfered with its administration, and contributed financial and other support to it, contrary to Section 8 of the National Labor Relations Act—the National Labor Relations Board has the power under said Act, in addition to ordering respondent to cease and desist from such interference, to order respondent (a) to withdraw all recognition from said organization as the representative of its employees for purposes of collective bargaining and (b) to post notices stating that such organization is so disestablished and that respondent will refrain from any such recognition thereof.

This question is the same as that raised in *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., and Greyhound Management Co.* (No. 413).

STATUTE INVOLVED

The statute involved is the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449,

U. S. C., Sup. II, Title 29, Sec. 151 *et seq.*). The pertinent provisions are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *

* * * * * *

SEC. 10 (c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board

shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

STATEMENT

Upon charges filed by the Brotherhood of Locomotive Firemen and Enginemen (R. 36–37), a labor organization, the National Labor Relations Board, through its Regional Director at San Francisco, issued and served upon respondent, on May 29, June 10, and July 8, 1936, respectively, a complaint, an amended complaint, and a second amended complaint, together with notices of hearing (R. 13–17, 36–37).[1] The second amended complaint alleged that respondent had engaged in certain unfair labor practices affecting interstate commerce, contrary to the provisions of Section 8, subdivisions (1), (2), and (3), of the National Labor Relations Act (R. 15–17). Beginning July 23, 1936, a hearing was held before a Trial Examiner duly designated by the Board (R. 38).

[1] The amended complaint differed from the original complaint only in one minor particular, not material here. The second amended complaint consolidated with the original proceeding another proceeding against the same company which had been instituted in another Region (see R. 13).

On August 25, 1936, the Trial Examiner filed an Intermediate Report, in which he found that respondent had engaged in the unfair labor practices charged (R. 39). Respondent filed no exceptions to this Report (*ibid.*). On December 18, 1936, the Board issued its findings of fact and order (R. 36–61).

The Board found that respondent, a subsidiary of the Greyhound Corporation and certain western railroads, operated a motor bus transportation system in interstate commerce in seven far western states (R. 39–40). Its findings with respect to the unfair labor practices charged against respondent were preceded by findings—essential to an understanding of the present issue—concerning the history of respondent's relation with labor organizations of its employees since 1933. These findings, none of which was challenged by the court below, may be summarized as follows:[2]

During the summer and fall of 1933, many of respondent's drivers applied for membership in the Brotherhood of Locomotive Firemen and Enginemen (R. 41, 81), an independent railroad labor organization which had just opened its ranks to motor coach operators (R. 41, 63, 236). Organization activity for the Brotherhood steadily continued until

[2] Of the record references in this statement, the first, or only, page reference is to the findings of the Board, unless otherwise expressly stated. Any additional references are to the supporting testimony.

"at one time during the fall of 1938, 264 of the respondent's 425 operators had signed authorization certificates empowering the Brotherhood to represent them for the purpose of collective bargaining with the respondent" (R. 41, 78). The respondent at once undertook an intensive campaign to check the activities of the Brotherhood (R. 41, 70–72, 82–83, 118–120, 122–123, 127–130, 140–141, 195–196, 247–248). "Operators were urged, persuaded and coerced to refrain from joining the Brotherhood and threatened with discharge if they did join" (*ibid.*). As part of this campaign, respondent in August and September, 1933, fostered the organization and growth of the Drivers Association, Pacific Greyhound Lines (*ibid.*).

On August 30, 1933, respondent conducted among the employees on all its divisions an election of representatives (R. 54, 81–82, 224–225, 236–239). The employees chosen were transported to San Francisco at respondent's expense, and without loss of pay, and at a meeting there were addressed by the respondent's president, W. A. Travis (R. 54, 225, 227). Travis told the representatives that they were free to "form" any organization they wished, and then said: "but, I believe, for your benefit, that if you have an organization of your own that you can do better, and that it will help you out more than going in some outside organization that don't know anything about the bus business" (R. 54, 225). The representatives accepted this "advice" (*ibid.*). Thereupon, under the guid-

ance and with the assistance of respondent's officers (R. 55, 226-228)—including Judge Lamm, respondent's general counsel, L. D. Jukes, the general manager, and Travis (R. 55, 203, 204-205, 226-228)—a constitution and by-laws of the organization were drafted, together with "a working agreement" between the Association and the respondent (*ibid.*). By the terms of the constitution and by-laws, which are still in effect (R. 55, 229, 250-253), the representatives present automatically assumed control of the Association (R. 55, 250-252).

The Drivers' Association, once organized, was used by respondent as a weapon against the Brotherhood. The Board found that respondent, in its efforts to establish the Association, "left no stone unturned; operators on the various divisions of its lines were urged, persuaded, threatened and coerced into joining" (R. 55). "The record is replete with testimony," it stated (*ibid.*), "showing that Travis was as active in promoting membership in the Drivers' Association as were the representatives of the organization." This activity of the respondent reached its culmination in April, 1934, after the Brotherhood, confident of possessing a majority of respondent's employees, had petitioned the National Labor Board to conduct an election (R. 41-42, 88-89). At a meeting of operators called by the respondent ten days before the election, Travis attacked the Brotherhood and urged support for the Drivers' Association (R. 42, 88, 119-

120, 247–248). Testimony supporting the Board's findings shows that respondent's officials presented to various leaders of the Brotherhood, ready for signature, revocations of their authorizations to the Brotherhood, together with applications for admission to the Drivers' Association (R. 119, 140–141, 247). Respondent's campaign achieved its immediate purpose. The Drivers' Association was successful in the election (R. 42, 89); and for a time the Brotherhood movement died down among the respondent's operators (*ibid.*).

In August, 1934, several of respondent's operators organized an independent Brotherhood of Motor Coach Operators. This movement, apparently springing from dissatisfaction with the Drivers' Association, was prompted by suggestions from respondent's president Travis, made during the election campaign, that respondent would not be hostile to an independent labor organization which was free from railroad affiliations (R. 42, 89–90, 239–240). Very soon thereafter, the president and secretary of the new organization were discharged; and this movement, too, died down (R. 42, 91). The old National Labor Relations Board, after complaint and hearing, found that the men had been discharged because of their union activities, and ordered their reinstatement;* but

* *In the Matter of Pacific Greyhound Lines, Inc., and Charles H. Perryman and Milton L. Seeman*, 2 N. L. R. B. (old) 837.

the respondent did not comply with the order (R. 42, 91, 240-241).

In the summer of 1935, following the passage of the National Labor Relations Act, respondent's operators commenced a third effort to affiliate with an independent labor organization—this time, once again, with the Brotherhood of Locomotive Firemen and Enginemen (R. 42, 91, 92). After this movement had resulted in "a huge increase in membership" in the Brotherhood and "a proportionate decrease in membership of the Drivers' Association" (R. 43, 92), respondent for the third time entered upon a campaign in support of the Association. At the Board hearing, respondent's counsel admitted that respondent had urged, persuaded, and warned its operators not to join the Brotherhood (R. 44). The Board referred to testimony that respondent's general manager addressed a meeting of the operators in the fall of 1935, stating that he was going to speak to them "two ways * * * officially, and unofficially":

> "Q. What did he say officially?
>
> "A. He said we could join any damn union we wanted to; * * *
>
> "Q. What did he say unofficially?
>
> "A. * * * first he told us that Mr. Travis had always been opposed to organized labor; had never dealt with it; and that he said he would step out of the President's chair * * * rather than to write a contract with the Brotherhood. He told us then

> that he didn't think we would ever get any benefits by being a member of any labor organization." (R. 42, 131.) * * *

Persuasion and warning, the Board found (R. 43-44), went to the extent of coercion and threats of discharge. By March, 1936, "the respondent was so violently expressing its hostility toward the Brotherhood that meetings of the Brotherhood, which had theretofore been conducted openly, were thereafter conducted secretly. * * * Membership * * * was also kept secret" (R. 44, 112). In March, April, and May, 1936, respondent at length discharged three of the most vigorous organizers for the Brotherhood (R. 43–50, 69, 105, 142). Two of these discharges were involved in the present proceedings; and the Board found that these men "were discharged because of their membership in and their activities for the Brotherhood" (R. 43–54).

Immediately after the last discharge, "Brotherhood activity among the respondent's operators ceased. The operators felt that such activity would result in their discharge as it had in the cases of Thompson, Sager, and Carny" (R. 51).

The Board found that respondent, in addition to sponsoring the Drivers' Association in contests with other labor organizations, had continuously interfered with and dominated its internal administration (R. 55, 57). It stated (R. 57):

> The fundamental structures upon which the Drivers' Association depends for its existence, the constitution and by-laws and the

so-called working agreement with the respondent, are the creation of the respondent. By these instruments the respondent continues to force its operators to accept the type of representation which it has dictated. Such representation is obviously inadequate. The constitution and by-laws provide that only employees of respondent of at least one year's standing may become "representatives", i. e., members of the Board of Governors of the Drivers' Association (R. 55, 250–252). The Board found that the Association, being "compelled to deal with the respondent through representatives admittedly inexperienced in matters of collective bargaining", had obtained "only minor concessions" from it (R. 57).

By the terms of the so-called working agreement, any operator "who considers that an injustice has been done him in any matter" may take his grievance first to his supervisory officer and then to the respondent's president, but in all cases "the decision of the president shall be final" (R. 55, 252–253). This provision, the Board found, "concentrates all the power over the destiny of its employees in the respondent's hands" (R. 57). Thus, one of respondent's own officials testified that "when the respondent and the men cannot agree on a certain matter, the status quo remains, and the Drivers' Association neither does nor can do anything about it" (R. 57). This same power was ever employed to effect changes in the working agreement itself. Respondent apparently did not

regard this agreement as binding upon it (R. 57, 192–194, Resp. Exs. 15, 16, 17). It felt that it could change the agreement unilaterally and did so repeatedly (*ibid.*). Its attitude in this respect is illustrated by a meeting of the Association held in August or September, 1935,[4] and attended by Hodge, an official of respondent (R. 56, 131–134). This meeting was described by the Board as follows (R. 56):

> At this meeting, called for the purpose of discussing working conditions, Hodge presented a plan proposed by the respondent, the particulars of which it is not necessary to discuss here, but the net effect of which was to favor the respondent's "Guarantee Men" to the detriment of the operators on its "On Call Board." Warren Macy testified at the hearing that there was no need for such a plan at the time it was proposed. The members of the Drivers' Association at the meeting unanimously voiced their disapproval of this plan. When it was suggested that a vote be taken, Hodge arose and informed the members present that "if Mr. Travis wanted it to go that way it would go that way, regardless of all the voting the drivers did at the meeting there." No vote was ever taken on the proposal, but the plan was nevertheless put into effect by the respondent, and was still in effect at the time of the hearing.

Respondent's officials frequently attended and addressed meetings of the Association (R. 56, 131–

[4] The Act went into effect July 5, 1935.

134, 230–231) and thereby exerted "a powerful pressure upon the members and representatives to do as the respondent bids" (R. 57). Respondent's officials took notes of the proceedings (R. 57, 133–134, 230–231).

Meetings of the members with their representatives were not regularly held; on some divisions no meetings had been held for over a year, on others none for a period of months (R. 56, 136, 139, 299–300, 231–232). Respondent supplied the Association with secretarial help, stationery and bulletin boards, and with suitable meeting quarters (R. 56, 198, 230–231). Members and representatives suffered no loss of pay for time spent at meetings (R. 56, 198–199, 220, 230), and were permitted to engage in organizing activities during working hours (R. 56, 220). Representatives of the Association received free transportation when organization affairs made travel necessary (R. 56, 198–199, 230). "The respondent takes an interest", the Board found, "in the elections conducted by the Drivers' Association and advises its employees as to who are the best candidates." (R. 56, 75.)

On the basis of the foregoing findings of fact, the Board concluded that respondent had interfered with its employees' right to self-organization in violation of Section 8 (1) of the Act, had discharged employees in order to discourage membership in the Brotherhood in violation of Section 8 (3), and had dominated and interfered with and contributed support to the Drivers' Association in

violation of Section 8 (2) (R. 58). It ordered respondent to cease and desist from each of these unfair labor practices (R. 60). In addition, it ordered the reinstatement with back pay of two of the discharged employees,* and ordered the withdrawal of recognition from the Drivers' Association (R. 60-61). The latter provisions of the order, which are the ones here in issue, required that respondents (R. 61):

> (c) Withdraw all recognition from the Drivers' Association, Pacific Greyhound Lines, as the representative of its operators for the purposes of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work; and completely disestablish the Drivers' Association, Pacific Greyhound Lines as such representative.
>
> (d) Immediately notify each and every one of its officers and agents in each of its divisions as well as each and every one of the representatives of the Drivers' Association, Pacific Greyhound Lines, that the Drivers' Association, Pacific Greyhound Lines is so disestablished and that it will refrain from any recognition thereof.
>
> (e) Post notices to its operators in conspicuous places in all of its terminals on each of its divisions stating: (1) that the Drivers' Association, Pacific Greyhound Lines, is disestablished as the representative of its operators for the purpose of dealing with it

* No complaint was made as to the third.

with respect to grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and that it will refrain from any recognition thereof; (2) that it will cease and desist in the manner aforesaid; and (3) that such notices will remain posted for a period of at least thirty (30) consecutive days from the date of posting.

In support of this portion of its order the Board said (R. 58):

> * * * There can be but one way of remedying the unlawful conduct in this case and that is by ordering a complete withdrawal of all recognition by the respondent of the Drivers' Association as the representative of its operators, in addition to ordering the cessation of such interference, domination, and support. What we said in In the Matter of Wheeling Steel Corporation and The Amalgamated Association of Iron, Steel, and Tin Workers of North America et al., Case No. C–3, decided May 12, 1936, is particularly applicable here:
>
> "Simply to order the respondent to cease supporting and interfering with the Councils would not set free the employee's impulse to seek the organization which would most effectively represent him. We cannot completely eliminate the force which the respondent's power exerts upon the employee. But the Councils will, if permitted to continue as representatives, provide the respondent with a device by which its power may now be made effective unobtrusively, al-

> most without further action on its part. Even though he would not have freely chosen the Council as an initial proposition, the employee, once having chosen, may by force of a timorous habit be held firmly to his choice. The employee must be released from these compulsions. Consequently the respondent must affirmatively withdraw recognition from the Departmental and General Councils, as organizations, for the purpose of collective bargaining upon behalf of its employees."

On February 1, 1937, the Board, pursuant to Section 10 (e) of the Act, petitioned the Circuit Court of Appeals for the Ninth Circuit for enforcement of the foregoing order (R. 263–67). On July 28, 1937, the Circuit Court entered its judgment enforcing the order in part, but declining to approve or enforce subdivisions (c) and (d) and clause (1) of subdivision (e), of paragraph 2, quoted above. The basis of the court's refusal to enforce these provisions was its belief that the Board could not compel withdrawal of recognition from a company dominated organization until another union had been found to be the representative of the majority of the employees concerned.

In order to secure a reversal of so much of the judgment of the Circuit Court of Appeals as refused to enforce the Board's order, the Board filed a petition for writ of certiorari in this Court. No petition seeking reversal of the remainder of the Board's order has been filed by respond-

ent. Accordingly, the only issues before the Court relate to the validity of those provisions of the Board's order which the court below refused to enforce.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that subdivisions (c) and (d) and clause (1) of subdivision (e) of paragraph 2 of the Board's order are not warranted by Section 10 (c) of the Act.

(2) In refusing to enforce and in setting aside subdivisions (c) and (d) and clause (1) of subdivision (e) of paragraph 2 of the Board's order.

SUMMARY OF ARGUMENT

The issue in this case is the same as that in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, No. 413. The Court is respectfully referred to the brief for the petitioner in that case for the main argument on behalf of the Board.

The differences between the methods of domination employed in the two cases are not accompanied by any differences in results or in the completeness of the domination achieved. Any factual distinctions between the two cases are thus entirely superficial.

ARGUMENT

The issue in this case is the same as that in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, No. 413. The Court is re-

specifically referred to the brief for the petitioner in that case for the main argument on behalf of the Board.

The Board's findings herein disclose the case of a company-dominated union in which domination has not gone to the same lengths of virtual merging of identity as in the *Pennsylvania Greyhound* case. Membership in the union was not automatic upon employment, but depended upon an affirmative act by the employee. Although respondent contributed to the financial support of the union, dues were paid. Meetings were held which the members could attend, although attendance was scanty and, as the Board found (R. 56), the members "have no voice in the determination of any policies." The employers in both cases shaped the organic structure of the union, but the respondent's action here was apparently less authoritarian than that of the respondents in the *Pennsylvania* case and it did not assume to retain for itself a legal power of veto over changes in the structure. The management's participation in the routine activities of the Association resulted, not from provision therefor in the organic law, but from custom and the natural weight of its influence.

Examination will demonstrate that these differences between the two cases are superficial rather than real.[1] The Board's findings permit no infer-

[1] The relationship between respondent and the Drivers' Association in this case is similar to that existing between the employers and the company-dominated unions in *Texas &*

ence that the differences in the methods of domination are paralleled by differences in its results or in its completeness. Indeed, the machinery of negotiation in the present case, involving no more than an appeal to the supervisory officer and then to the final authority of the president, was even more rudimentary than in the *Pennsylvania* case. Merely to direct the respondent to desist from further affirmative acts of interference will not make possible, through the Drivers' Association, collective bargaining in the sense contemplated by the Act. In both cases establishment of the company union as the purported representative of the employees has been accomplished by interference and coercion of the management. In neither case, therefore, can that union be said to be the free choice of the employees. Here, as in the *Pennsylvania* case, the respondent, if permitted to continue to treat with and recognize the Association, would be licensed to perpetuate the principal effect of its previous unlawful interference—the collective bargaining status which its recognition gave the Association. Here, as in the *Pennsylvania* case, continued recognition of the Association, supported by the weight of the respondent's long-continued approval of that organization, and its concomitant hostility to other unions, would operate as a powerful impediment to the development of

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New Orleans S. Co. v. Brotherhood of Railway Clerks, 334 U. S. 323, and *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515. In both of these cases this Court upheld orders disestablishing the company-dominated unions. See brief for the petitioner in No. 418, pages 34–40.

genuine collective bargaining through independent labor organizations.[1]

The present record lends peculiar force to the Board's conclusion as to the importance—in effectuating the purposes of the Act—of placing beyond respondent's power this means of influencing its employees' choice of representatives. For the Drivers' Association has long been used, not merely as a means of forestalling potential employee self-organization, but as a weapon in combatting actual self-organization. The Board's findings recount the persistent efforts of respondent's employees, at great personal cost, to obtain independent collective representation. The Drivers' Association has manifestly become a symbol of the respondent's hostility to such efforts. Thrice it has been utilized successfully to defeat them. The Association will not lose the weight of respondent's approval, in future contests with other labor organizations, merely because the approval has ceased to be expressed improperly. Nor will the respondent's employees, with this chief obstacle to an alternative organization still enjoying the status of recognition, obtain either

[1] Several of the most active organizers for the Brotherhood in the instant case testified that they retained their membership in the Drivers' Association (*e. g.*, R. 85–87, 140–142). This testimony illustrates at once the meaninglessness of employee membership in a company-dominated union as an expression of employee approval, and the value of such a union's established position as a means of gaining purported adherents.

freedom or assurance of freedom in opposing the Association. The testimony, as well as the findings, illustrates the acute difficulty of establishing whether an infraction of the rules or an accident by a driver who is an active union organizer, was a pretext or a just cause of his discharge (R. 45–54). In these circumstances the Board unquestionably could properly conclude that disestablishment of the Association, which had been maintained by respondent's unlawful action, would effectuate the purposes of the Act by removing a barrier to the development of genuine collective bargaining among the respondent's employees.

In the instant case the Circuit Court of Appeals took the position that the National Labor Relations Board had no authority to order withdrawal of recognition from a company-dominated union until it was shown that another organization represented a majority of the employees concerned—in other words, that such an order could only be made in a proceeding brought under Section 8 (5) of the Act to compel the employer to bargain collectively, after invocation of the machinery of Section 9 (c) for determining the representative chosen by the majority (R. 270–71). The same point was suggested by the Circuit Court of Appeals for the Third Circuit in the *Pennsylvania Greyhound* case, and the question is fully discussed in the petitioner's brief in that case. See brief for the petitioner in No. 413, pages 42 to 45.

The court below also adverted to the fact that no notice of hearing was served upon the Drivers' Association (R. 270). This point was also made in the *Pennsylvania Greyhound* case, and is discussed in our brief in that case at pages 46 to 50. The contention is even less substantial here, inasmuch as a leading official in the Drivers' Association was actually present and testified at the hearing before the Board (R. 228–239).

CONCLUSION

It is respectfully submitted that the judgment of the court below, in so far as it set aside and refused to enforce subdivisions (c) and (d) and clause (1) of subdivision (e) of paragraph 2 of the Board's order, should be reversed.

GOLDEN W. BELL,
Acting Solicitor General.
ROBERT L. STERN,
Special Assistant to the Attorney General.
HENRY M. HART, JR.
Attorney.

CHARLES FAHY,
General Counsel
ROBERT B. WATTS,
Associate General Counsel
LAURENCE A. KNAPP,
ROBERT S. ERDAHL,
Attorneys,
National Labor Relations Board

JANUARY 1938

U. S. GOVERNMENT PRINTING OFFICE: 1938